Supreme Court, U.S.
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No. 94-584

In the Supreme Court of the United States

OCTOBER TERM, 1994

KIRK D. BILBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted of conduct unbecoming an officer in violation of Article 133 of the Uniform Code of Military Justice, 10 U.S.C. 933.

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) (Pet. App. 1a-9a) is reported at 39 M.J. 467. The opinion of the United States Air Force Court of Military Review (Pet. App. 10a-19a) is reported at 34 M.J. 1191.

JURISDICTION

The judgment of the Court of Military Appeals was entered on July 14, 1994. The petition for a writ of certiorari was filed on September 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

Petitioner pleaded guilty at a general court-martial to conduct unbecoming an officer. See Article 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 933. The military judge sentenced him to dismissal from the service. The convening authority approved the findings and sentence. The Air Force Court of Military Review and the Court of Military Appeals affirmed. Pet. App. 1a-9a, 10a-19a.

1. Under an alias, petitioner requested and received a catalogue containing pornographic materials. As part of an undercover operation targeting child pornography, the United States Customs Service obtained the mailing list for the catalogue and sent petitioner a flyer advertising "extremely hard to obtain erotica." Pet. App. 2a. Although the flyer did not mention child pornography, petitioner responded by asking to purchase "very very young sex videos and magazines." *Ibid.* Petitioner was sent a catalogue featuring pre-teen and young teen subjects, and he ordered two videotapes and two magazines. The catalogue's descriptions of the videotapes made clear that they depicted children between the ages of 5 and 12 engaged in explicit sexual activity. After petitioner received the materials, his residence was searched pursuant to a warrant, and petitioner was apprehended. *Id.* at 3a.

2. Petitioner was charged with a violation of Article 133 of the UCMJ, which provides that "[a]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." 10 U.S.C. 933. As referred to trial, the specification alleged that petitioner had "wrongfully and dishonorably solicit[ed] the distribution of videotapes and/or magazines depicting

child pornography involving children engaged in bondage, sadism, bestiality, and/or homosexual acts, and young male castration." Pet. App. 3a. Petitioner negotiated a pretrial agreement to plead guilty to that specification. *Ibid.*

At the plea hearing the military judge expressed skepticism that the specification was sufficient to state an offense absent express reference to federal legislation prohibiting the distribution of child pornography. See II R. 34 ("In the absence of a Federal statute, what makes it wrongful to distribute child pornography?"); Pet. App. 3a. The parties subsequently agreed to amend the specification to include the statement that "the distribution of the said videotapes and/or magazines is a violation of 18 USC 2252." II R. 38; Pet. App. 4a, 11a. Petitioner pleaded guilty to the amended specification. Pet. App. 4a. Petitioner was sentenced to dismissal from the service, and the convening authority approved the findings and sentence. *Id.* at 2a. Petitioner appealed, contending, *inter alia*, that the specification as amended failed to state an offense and failed to allege all elements of the offense charged. *Id.* at 11a. The Air Force Court of Military Review affirmed. *Id.* at 10a-19a.

3. Petitioner then sought review in the Court of Military Appeals. Relying on *United States* v. *X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), reversed, No. 93-723 (Nov. 29, 1994), he contended that 18 U.S.C. 2252 (1988 & Supp. V 1993) is unconstitutional because it lacks any scienter requirement with respect to the minority of the performers depicted. Petitioner further contended that the unconstitutionality of the underlying statute rendered his plea and conviction invalid. Pet. App. 5a.

The Court of Military Appeals stated that it "need not enter the quagmire of the debate over whether 18 U.S.C.

§ 2252 is constitutional." Pet. App. 8a. Under Article 133, the court noted, "all that is necessary is that [petitioner] did some certain act and that, under the circumstances, that act constituted conduct unbecoming an officer." Pet. App. 8a. The court concluded that

> [w]e do not believe that it seriously can be doubted that a military officer's act of soliciting another person to violate a Federal statute is disgraceful and dishonorable conduct, without regard for the nature of the statute (that is, what i[t] prohibits) or for the lawfulness of the statute (that is, whether it ultimately is upheld as constitutional). * * * Simply stated, it is unbecoming for an officer to solicit someone to violate a Federal statute—period.

Ibid. (citation omitted).

ARGUMENT

Petitioner challenges the Court of Military Appeals' holding that solicitation to violate even an unconstitutional federal statute is "conduct unbecoming an officer" within the meaning of Article 133. That question is not properly presented in this case. The federal statute at issue here is 18 U.S.C. 2252 (1988 & Supp. V 1993). On November 29, 1994, this Court issued its opinion in *United States* v. *X-Citement Video, Inc.*, No. 93-723, holding that Section 2252 requires knowledge of the minority of the performers depicted engaging in sexually explicit conduct and that the statute, so construed, is constitutional. In light of that holding, petitioner plainly has no tenable basis for challenging the specification to which he pleaded guilty. Indeed, petitioner has conceded (Pet. 8) that if *X-Citement Video* is decided in the government's favor, his petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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